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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

STEVEN A. MOCK,

Plaintiff and Respondent,

v.

COUNTY OF LOS ANGELES et al.,

Defendants and Appellants.

B217502

(Los Angeles County  
Super. Ct. No. BC365462)

APPEAL from an order of the Superior Court of Los Angeles County.

C. Edward Simpson, Judge. Reversed.

Hurrell Cantrall, Thomas C. Hurrell, Melinda Cantrall, Blair L. Schlecter, and  
Chris Cummiskey for Defendants and Appellants.

Law Offices of Rosen and Zimmerman and Paul S. Zimmerman for Plaintiff and  
Respondent.

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Defendants and appellants County of Los Angeles (the County) and Carl G. Smith (Smith) appeal from a trial court order awarding attorney fees to plaintiff and respondent Steven A. Mock (Mock) pursuant to 42 United States Code section 1988 (section 1988). We agree with defendants that the trial court's order is erroneous. Mock did not plead and pursue a claim pursuant to 42 United States Code section 1983 (section 1983). Absent a cause of action pursuant to section 1983, Mock is not entitled to attorney fees pursuant to section 1988. Accordingly, the trial court's order awarding him attorney fees is reversed.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### *Factual Background*

Viewed in accordance with the usual rule of appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence established that on May 26, 2006, Los Angeles County Sheriff's deputies responded to a report of a possible disturbance at the El Monte Bus Terminal. Mock was arrested by Smith and cited for being intoxicated in public in a condition in which he was unable to care for himself, under Penal Code section 647, subdivision (f), and for resisting arrest, under Penal Code section 148.

After arrest, Smith handcuffed Mock and forced him into the backseat of the patrol car, injuring Mock's finger and further injuring him when he pushed him into the car.

Locked in the back of the patrol car and in pain, Mock called out to Smith, complaining of pain. When there was no response, Mock began kicking the car window to get Smith's attention. Smith responded by opening the car door and kicking Mock in the face. The kick fractured Mock's mandible, jamming several teeth into his upper jaw, breaking them and causing nerve damage.

When he was brought to the jail, Deputy Roel Garcia (Garcia) allegedly failed to provide Mock with adequate medical care.

## *Procedural Background*

### The Complaint

On January 29, 2007, Mock filed the instant action alleging: (1) violation of the Bane Act (Civ. Code, § 52.1) against Smith and the County; (2) false arrest and imprisonment against Smith and the County; (3) assault against Smith and the County; (4) battery against Smith and the County; (5) negligence against Garcia; and (6) negligence in hiring, training, retention, and supervision against the County. The complaint did not allege a claim for violation of section 1983; nor did Mock request attorney fees pursuant to section 1988.

### The County and Garcia's Motion for Summary Adjudication

On September 26, 2008, the trial court granted the County's motion for summary adjudication of the negligence cause of action and Garcia's motion for summary judgment. Judgment was entered for Garcia.

### Mock's Motion to Amend the Complaint

On January 15, 2009, two years after he file his complaint, Mock filed an ex parte application to shorten time to hear a motion to amend the complaint. His application was granted, and Mock's motion was set for hearing. On February 4, 2009, just 13 days before trial, the trial court heard Mock's motion to amend the complaint.

In his motion, Mock sought to amend the complaint to add the following causes of action: (1) false arrest and excessive force in violation of section 1983; (2) false arrest and retaliation in violation of section 1983; and (3) intentional infliction of emotional distress.<sup>1</sup> He argued that his "addition of one new cause of action and the addition of a claim for punitive damages based on the facts of . . . Smith's false arrest of and use of excessive force against [Mock] as stated in the original complaint [would] not create any possible prejudice to defendants. No discovery further than or different from that which has already been completed or is pending needs to be done."

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<sup>1</sup> Mock also sought to add several defendants and a claim for punitive damages.

Defendants opposed Mock's motion. They argued Mock's motion was untimely and therefore prejudicial. Mock "cannot refrain from setting forth a cause of action, which would give subject matter jurisdiction to the federal courts and be grounds for removal, throughout the pendency of the case thereby precluding the defendant's right of removal, and then add the claim on the eve of trial." Worse, Mock failed to "attempt to offer an explanation for the delay in alleging a [section 1983] claim against" Smith.

At the hearing, the trial court entertained oral argument. Mock's counsel argued that "as to the new claims against . . . Smith and the County, those are based on the same operative facts as the earlier claims." Because the proposed amendment was based upon the same general set of facts, it should be allowed.

In response to the trial court's inquiry, Mock's counsel clarified the amendment: "It has two parts. One is just a re-statement of new theories against . . . Smith."

Later, defendants' counsel explained the prejudice to Smith and the County if Mock's motion were granted: "[T]he County and . . . Smith are proceeding with this case along the same lines since the case was filed in January 2007. Now they're days before trial, there's an amendment, really sort of creating a new case that's going to create prejudice for them."

Ultimately, the trial court denied Mock's motion to amend, finding that he had been dilatory in seeking to amend the complaint and that an amendment at that time would have been prejudicial to defendants.

### Trial and Judgment

The case proceeded to a jury trial on February 17, 2009. After presentation of the evidence, the jury found in favor of Mock on his claim for battery only. Specifically, the jury found that Smith had "used unreasonable force against [Mock] in violation of state law" and that his "use of unreasonable force [was] a substantial factor in causing [Mock's] injury." The jury found in favor of Smith on Mock's cause of action for violation of the Bane Act, finding that Smith did not "interfere or attempt to interfere with . . . Mock's constitutional or statutory rights under the laws of the United States and/or under the laws of the State of California [by] using threats, intimidation or

coercion in violation of California Civil Code Section 52.1.” The jury also reached a verdict in favor of defendants on Mock’s false arrest claim, finding that Smith had probable cause to arrest Mock.<sup>2</sup>

Mock was awarded \$241,350 in damages.

Judgment was entered on April 13, 2009.

Mock’s Motion for Attorney Fees

On April 16, 2009, Mock filed a motion for attorney fees (\$516,232.50) pursuant to sections 1983 and 1988. He argued that although he “did not specifically denominate a cause of action for violation of [section 1983] in his complaint, . . . Smith’s use of unreasonable force nevertheless constitute[d] a violation of that section which . . . entitle[d] [Mock] to recover attorney fees pursuant to [section 1988], regardless of his not having titled any cause of action as being for violation of section 1983 and regardless of the fact that he did not prevail on other claims stated in the complaint.” (Fn. omitted.) “Under the relevant case law, both state and Federal, the judgment entered in [Mock’s] favor on his battery claim entitle[d] him to recover” attorney fees pursuant to section 1988. After all, the jury found that Smith had used excessive force against him, a finding which established a violation of section 1983.

Defendants opposed Mock’s motion, asserting that there is no authority to award Mock attorney fees under section 1988 where the trial court has specifically denied his attempt to pursue a claim under section 1983. Moreover, prevailing on a battery claim is not the same as prevailing on a claim for excessive force under section 1983. Finally, allowing Mock to recoup his attorney fees in the instant case would sanction forum shopping and amount to undue surprise to defendants.

On May 15, 2009, the trial court granted Mock’s motion, awarding him \$329,208.35 in attorney fees. The trial court stated: “Although the complaint did not specifically allege a section . . . 1983 claim, the case, as presented and proven to the jury

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<sup>2</sup> Mock’s assault cause of action was never tried; the trial court refused to give his proposed jury instruction on assault.

was, in fact, a 1983 action. The denial of [Mock's] motion to file an amended complaint was not an adverse adjudication of that claim.” Citing *Green v. Obledo* (1984) 161 Cal.App.3d 678 (*Green*) and *Best v. California Apprenticeship Council* (1987) 193 Cal.App.3d 1448 (*Best*), the trial court noted that “[t]he labeling of the cause of action is not determinative, but rather the subject matter of the action is to be determined by the allegations and evidence at trial, regardless of what it is called. [Citations.] In this case, [Mock] alleged and proved that . . . Smith’s use of excessive force under color of [state] law deprived hi[m] of his constitutional rights. An award of attorney’s fees is not inconsistent with the holding in *McFadden v. Villa* (2001) 93 Cal.App.4th 235 [(*McFadden*)], which held that such award of fees is proper where the plaintiff succeeds in some way on a federal claim or a federal claim was not adjudicated at all and the state law claim was for all intent and purpose a [section] 1983 civil rights claim for use of excessive force under color of law.”

Defendants’ timely appeal from the order granting Mock’s motion for attorney fees ensued.

## **DISCUSSION**

### *I. Standard of Review*

The determination of the legal basis for an attorney fee award is a question of law that we review de novo. (*Sessions Payroll Management, Inc. v. Nobel Construction Co.* (2000) 84 Cal.App.4th 671, 677; *Corbett v. Hayward Dodge, Inc.* (2004) 119 Cal.App.4th 915, 921; *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.)

### *II. Mock is not Entitled to Attorney Fees Pursuant to Section 1988*

It is well-established that in the absence of an express statute or contractual agreement, a prevailing party in litigation is responsible for his or her own attorney fees. (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 429; Code Civ. Proc., § 1021; *Trope v. Katz* (1995) 11 Cal.4th 274, 278 [“California follows what is commonly referred to as the American rule, which provides that each party to a lawsuit must ordinarily pay his own attorney fees”].) Section 1988 is an express statute that provides for the recovery of attorney fees. “In any action or proceeding to enforce a provision of section[] . . . 1983

. . . of this title, title IX of Public Law 92-318 . . . , [or] title VI of the Civil Rights Act of 1964 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.” (§ 1988(b), fn. omitted; *Farrar v. Hobby* (1992) 506 U.S. 103, 109.)

Applying the foregoing principles to the instant litigation and as the parties seem to agree, Mock only is entitled to recoup his attorney fees if he can establish that he was the prevailing party in a section 1983 action. Where they part ways is on the question of whether Mock pled and proved a claim under section 1983. That is the issue we consider.

We agree with defendants that Mock did not pursue or prevail on a claim for violation of section 1983. The trial court erred when it found that “the case, as presented and proven to the jury, was, in fact, a [section] 1983 action.” His complaint does not allege such a cause of action, a fact well-known to Mock since he sought (unsuccessfully) to amend his complaint to include this claim just before trial. And, section 1983 was never argued by counsel or mentioned in the jury instructions or even referenced in the special verdict form.

According to Mock, it is irrelevant that he did not expressly allege a violation of section 1983. Pursuant to *Kreutzer v. County of San Diego* (1984) 153 Cal.App.3d 62, 69 (*Kreutzer*), *Green, supra*, 161 Cal.App.3d at page 678, and *Best, supra*, 193 Cal.App.3d 1448, the law does not require that a claim for a section 1983 violation be specifically pled; rather the only requirement is that the plaintiff allege a deprivation of rights by someone acting under color of law. While Mock accurately summarizes the holdings of these cases, they do not support his request for attorney fees in the instant case.

*Kreutzer, supra*, 153 Cal.App.3d at page 69 confirmed that “the [labeling] of a plaintiff's pleading is not determinative.” Rather, “[i]n California . . . the nature and character of a pleading are to be determined from its allegations, regardless of what they may be called, and the subject matter of the action and the issues involved are determined from the facts alleged rather than from the title of the pleading. [Citation.]” (*Kreutzer, supra*, at p. 69.) Similarly, in *Green, supra*, 161 Cal.App.3d at page 682, the Court of

Appeal noted: “Whether the plaintiffs tendered a section 1983 claim in the underlying action is measured by their pleadings. . . . No label is required. [¶] Whether the facts alleged tender a section 1983 claim is measured by federal law. [Citation.] ‘[I]n any [section] 1983 action the initial inquiry must focus on whether the two essential elements to a [section] 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States.’ [Citation.]” (See also *Best, supra*, 193 Cal.App.3d at p. 1463 [“Under California and federal law, the labeling of a pleading is not determinative, but rather the subject matter of the action is to be determined from its allegations, regardless of what they may be called. . . . [¶] A section 1983 claim requires an examination of two essential elements: (1) whether the conduct was committed under color of state law, and (2) whether the conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States”].) In other words, although no federal claim may be expressly asserted, courts can determine if, by implication, such relief has been sought. (*McFadden, supra*, 93 Cal.App.4th at p. 239.)

Following these cases, we must examine Mock’s complaint and what he pursued during this litigation to determine whether he pled and proved a cause of action for violation of section 1983. For the reasons set forth above, we readily conclude that Mock did not plead—expressly or by implication—and pursue a section 1983 claim. At the risk of sounding redundant, that claim cannot be found in his complaint; the federal statute is not even identified in the pleading. (*Green, supra*, 161 Cal.App.3d at p. 682.) At some point, Mock apparently realized this omission because on the eve of trial, he sought to amend his complaint to include this claim, including a request for attorney fees. Yet, his attempt to amend his claims was denied. And, there is no indication that section 1983 was argued to the jury. In fact, the jury was not asked to find and did not find that Smith deprived Mock of any rights, privileges, or immunities secured by the Constitution or laws of the United States.



Mock argues that his battery claim, including the jury’s finding that Smith used excessive force against him, established a violation of section 1983. After all, police use of unreasonable force constitutes a violation of that statute. We disagree. Mock “has not supplied any persuasive authority that a state claim for battery by a peace officer and a federal claim for excessive force are identical causes of action.” (*McFadden, supra*, 93 Cal.App.4th at p. 241.) “[E]very battery under state law does not result in a constitutional violation.” (*Ibid.*) In fact, “a section 1983 claim is actually harder to prove than a battery claim.” (*Id.* at p. 242.) That holding is particularly compelling here, given the jury’s specific finding that Smith used unreasonable force “in violation of state law.” There was no finding that Smith used excessive force in violation of the Constitution.<sup>3</sup> (Compare *Best, supra*, 193 Cal.App.3d at p. 1464 [although the court’s religious freedom decision was based on Government Code section 12940, subdivision (c), the court found that it would have been “compelled” to reach the same conclusion under the First Amendment of the United States Constitution].)

Finally, we agree with defendants that allowing Mock to recover attorney fees in this case would be manifestly unfair.<sup>4</sup> Defendants were not on notice that Mock would be seeking attorney fees until they received his motion for attorney fees, after trial. (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211 [purpose of complaint is to give notice of claims of the parties].) They litigated this action, including presumably by evaluating settlement options, with the allegations of the complaint in mind. And, defendants were deprived of the opportunity to remove this case

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<sup>3</sup> We reach this conclusion without considering defendants’ argument that because Mock lost at trial on his Bane Act cause of action, he necessarily did not establish a violation of section 1983.

<sup>4</sup> We disapprove of Mock’s contention that defendants cannot “claim that they were denied an opportunity to defend a claim that they successfully kept themselves from defending.” Defendants’ opposition to Mock’s belated motion to amend the complaint cannot be used against defendants in this way.

to federal court, including the opportunity to assert certain defenses.<sup>5</sup> Under these circumstances, it would be highly prejudicial to allow the attorney fee award to stand.

Because we conclude that Mock was not entitled to attorney fees as a matter of law, we need not address defendants' argument on appeal that the award of attorney fees was unreasonable and excessive.

### **DISPOSITION**

The order of the trial court is reversed. Defendants are entitled to costs on appeal.

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\_\_\_\_\_, J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, Acting P. J.  
DOI TODD

\_\_\_\_\_, J.  
CHAVEZ

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<sup>5</sup> After reviewing the complaint, we readily conclude that defendants could not have known that a federal claim was alleged against them. Thus, they had no reason to attempt to remove the action to federal court.